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June 11, 2014

Kent L. Jones, P.E.
State Engineer
UTAH DIVISION OF WATER RIGHTS
1594 West North Temple, Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300

Via Hand Delivery

Re: Unlawful Storage in Three Creeks Reservoir

Dear Mr. Jones:

We represent Rocky Ford Irrigation Company (“**Rocky Ford**”) in relation to its water rights on the Beaver River. The Beaver River has, for many years, been fraught with significant disputes over water rights, delivery, and use. A primary focus of the Utah Division of Water Rights (the “**Division**”) on the Beaver River over the past couple of years has been installation of proper measuring devices and, in some cases, telemetry. We applaud that effort and have already seen great improvements in distribution as a result. One advantage of having adequate measuring devices and telemetry is the ability to correct distribution problems as they occur rather than after the fact. This letter seeks action by the Division to address one such problem—unlawful storage in Three Creeks Reservoir—that has deprived the lower users on the Beaver River, including Rocky Ford, of hundreds of acre-feet of water so far this year.¹

BACKGROUND

Rocky Ford delivers water to thousands of acres of land in Beaver County and, with its predecessors, has done so since at least 1870. In 1931, Judge LeRoy H. Cox entered the Beaver River Decree in *Hardy v. Beaver County Irrigation Co.*, Civil No. 625, Fifth Judicial District Court (Nov. 13, 1931) (the “**Decree**”). In addition to Rocky Ford’s primary storage water right, water right number 71-1948, the Decree confirms Rocky Ford’s ownership of the following 379.22 cfs of direct flow water rights from the Beaver River: 40.67 cfs of 1870 rights (Award 96a, b), 63.55 cfs of 1890 rights (Award 96c, d, 102), 5 cfs of 1903 rights (Award 96e), 150 cfs of 1907 rights (Award 96g), and 120 cfs of 1909 rights (Award 96h). The points of diversion for

¹ Rocky Ford has other concerns, including improper storage in Kents Lake Reservoirs and inadequate reporting on the South Fork of the Beaver River and on Merchant Creek, but this letter addresses only improper storage in Three Creeks Reservoir under the Direct Flow Changes (as defined below).

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these rights are not at the Minersville Reservoir Dam, but are actually downstream from the dam. A map of these points of diversion is attached as **Exhibit A**. The Decree also confirms that Rocky Ford must furnish guaranteed delivery of 7500 acre-feet of water each year to Minersville Reservoir and Irrigation Company (“**MRIC**”). Additionally, Rocky Ford is obligated to maintain 2000 acre-feet of storage in Minersville Reservoir as a conservation pool. Because so much of the storage in Minersville Reservoir is allocated to other users, Rocky Ford has long endeavored to protect its direct flow rights as well as its storage right.

In 1943, after a protracted legal battle between Kent’s Lake Reservoir Company (“**KLRC**”) and Rocky Ford, the Fifth District Court issued an Amended Decree providing that the KLRC change application that moved water from Kents Lake to Three Creeks Reservoir was properly approved but was limited based on both the overall flow of the Beaver River at the USGS gage (must exceed 164 cfs) and the flow in the South Fork (the aggregate diversion to storage to both Kents Lake and Three Creeks reservoirs could not exceed the amount of water available to store from the South Fork). The Amended Decree also affirmed the approval of the KLRC application to appropriate but noted that it was junior in priority to all existing rights on the Beaver River, both above and below Patterson Dam.

Following these approvals, and in spite of their limitations, KLRC constructed Three Creeks Reservoir, completing its construction in 1949. In 1953, KLRC and Rocky Ford entered into a Memorandum Agreement where Rocky Ford agreed not to protest new change applications by KLRC shareholders that would take 1890 direct flow water rights and allow a portion of those rights to be stored in Three Creeks Reservoir (the “**Direct Flow Changes**”). Over the next few years, the KLRC shareholders filed the Direct Flow Changes, and, as required by the Memorandum Agreement, Rocky Ford did not protest the applications. The Direct Flow Changes were ultimately approved “[s]ubject to prior rights whether diverting directly from the source hereof or from other sources to which this water is tributary (including rights junior to the original application or rights which might be impaired by the change or changes) for diversion and use as herein described.” From the time of the 1953 Memorandum Agreement until very recently, it was virtually impossible for Rocky Ford to effectively monitor storage in Three Creeks because the required measuring devices associated with use under the Direct Flow Changes and the earlier change application were lacking, and the measurements, when taken, were often not reported or were not reported until after the irrigation season had ended.

Rocky Ford expressed concern over the years to the Division about KLRC’s storage. Indeed, in 2004 and 2005, Rocky Ford worked with the Division and other stakeholders to more accurately distribute storage rights on the Beaver River. The culmination of this effort was the Interim Distribution Order (the “**IDO**”) issued by the Division on March 1, 2005. A copy of the IDO, and the April 28, 2005 clarifications, are attached as **Exhibit B**. Although Rocky Ford did not agree to everything in the IDO, it was willing to try operating temporarily under the IDO because it was better than the virtual lack of storage regulation that existed previously. Notwithstanding an emphasis during the process leading up to the IDO on fixing measuring devices and improving reporting, the measurement and reporting was continually lacking over the next eight years. But with installation of telemetry at Three Creeks Reservoir and the diversion points below Patterson Dam, it is now possible to better assess both whether the IDO is being followed at Three Creeks Reservoir and whether the IDO adequately protects Rocky Ford’s decreed water rights.

Securing the water to which it is entitled is of immediate and desperate importance to Rocky Ford. Even with some of the improved distribution on the Beaver River, water deliveries to Rocky Ford shareholders were extremely low in 2013 and will be even lower this year. Specifically, Rocky Ford shareholders received just 1.125 acre-feet per share in 2013 and they received only 0.57 acre-feet per share in 2014. To put this in perspective, no shareholder received any water deliveries in 2013 after July 10, and a shareholder generally needs at least two (2) acre-feet per share just to secure a second cutting of alfalfa.

The water situation for Rocky Ford shareholders is particularly distressing this year. Diversion to storage in Minersville Reservoir ceased on April 7th. Since April 7th, Rocky Ford has received a maximum daily average flow rate of 19.77 cfs. The outflow from Minersville Reservoir from April 7th through the 10th was 19 cfs, and the outflow from April 10th through June 7th was 38 cfs. Thus, all water reaching the Minersville Reservoir after April 7th has been passed through, delivered to MRIC and Rocky Ford shareholders under Rocky Ford's direct flow water rights, and supplemented with water from storage. Although Rocky Ford has not been storing any water since early-April, KLRC began diverting water to storage in Three Creeks Reservoir in mid-May. As of the date of this letter, KLRC has diverted 832 acre-feet into storage in Three Creeks Reservoir for use later in the irrigation season. In contrast, Rocky Ford was forced to cut off all further deliveries to its shareholders on June 7th to ensure that its obligation to MRIC and to maintain the conservation pool are fully satisfied.

ANALYSIS

Based on the storage and diversion records this year, KLRC has illegally stored hundreds of acre-feet of water in Three Creeks Reservoir, which water should be released and allowed to flow to the below-Patterson users, including Rocky Ford. Utah Code section 73-5-3 provides that "[t]he state engineer shall divide . . . the water . . . among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control . . . the use of such water by such closing or partial closing of the head gates, caps, valves or other controlling works of any . . . means of diversion as will prevent the . . . use in excess of the quantity to which any appropriator is lawfully entitled." As further discussed below, the Division must take the following actions to meet its statutory obligation to regulate storage in Three Creeks Reservoir under the Direct Flow Changes: (1) order KLRC to promptly release all but 325 acre-feet of storage from Three Creeks Reservoir; and (2) issue a notice that a new distribution order will take effect prior to the 2015 irrigation season and begin whatever administrative process the Division deems necessary to issue the revised order.

I. The Division Should Order KLRC to Promptly Release All But 325 Acre-feet of the Water Stored in Three Creeks Reservoir

KLRC has diverted hundreds of acre-feet of water into storage in Three Creeks Reservoir in violation of the IDO, and that water should be released to the downstream users. The Division has confirmed on many occasions that distribution will occur based on the IDO until it is formally superseded, which has not yet occurred. The IDO includes the Beaver River Water Rights General Description and Relative Priority table (the "**Priority Schedule**"), which indicates that direct flow diversions below Patterson Dam have "a higher priority relative to the

upstream storage rights when BR is flowing between 120 cfs and 161.31 cfs.” The April 28, 2005 letter from Lee Sim clarifies that storage under the Direct Flow Changes can only occur “if the direct flow water users below Patterson Dam are satisfied AND if there is 7500 ac ft in Minersville Reservoir.”

Nothing in the Priority Schedule or other portions of the IDO suggests that Rocky Ford’s direct flow rights are somehow excluded from the direct flow diversions below Patterson Dam. And the IDO states that “[t]he flow [of the Beaver River below Patterson Dam] is determined as the sum of *all* the measured diversions below Patterson Dam.” (Emphasis added.) The only Rocky Ford water right that the IDO purports to place at a lower priority than the Direct Flow Changes is water right number 71-1948—Rocky Ford’s storage water right. Specifically, in interpreting the 1953 Memorandum Agreement, the IDO states that “Paragraphs 3 and 4 of the 1953 Agreement give [the Direct Flow Changes] priority over Rocky Ford’s *storage* rights in Minersville Reservoir.” (Emphasis added.) Ultimately, the IDO is simply not susceptible to an interpretation that subordinates Rocky Ford’s direct flow water rights to the Direct Flow Changes. The Division may not legally disregard the plain language of the established IDO based on an assertion that something different was intended. See *Archer v. Bd. of State Lands and Forestry*, 907 P.2d 1142, 1145–46 (Utah 1995). Rather, if the Division desires to administer storage on the Beaver River differently than what is required by the IDO, then it must first revise the IDO. (See *Part II* below.)²

Because the maximum daily average water delivery to Rocky Ford since April 1, 2014, was 19.77 cfs—a flow rate less than half of Rocky Ford’s 1870 direct flow rights, and a mere fraction of its total decreed direct flow rights—any storage by KLRC in Three Creeks Reservoir beyond 325 acre-feet³ violates the IDO and directly impairs Rocky Ford’s water rights. Stated differently, because Rocky Ford has not received its full decreed direct flow rights, which have priority over the Direct Flow Changes under the IDO and general water right principles, KLRC’s storage under the Direct Flow Changes was plainly improper. Thus, the Division should order KLRC to promptly release 832 acre-feet of water from Three Creeks Reservoir. By immediately releasing the improperly stored water, the damage to the lower Beaver users can be largely mitigated. If the release is delayed, however, then upper Beaver users will likely use the water, with little reaching the lower users who have been damaged by the improper storage. And if KLRC fails to immediately abide by the release order, the Division should immediately impose on KLRC the statutory penalties, including water replacement and costs, for unauthorized water use.

Even if the Division reads into the IDO and the Memorandum Agreement a subordination of Rocky Ford’s direct flow rights—an interpretation that is not supported by the text of either document—KLRC’s storage in Three Creeks Reservoir would nevertheless violate the IDO. At

² KLRC acknowledged in its April 5, 2013 Letter to you that the IDO should continue to govern until changed. But in that same letter, KLRC implores the Division to distribute storage water based on “the status quo” and how it “has been historically” done rather than on the provisions of the IDO itself. In other words, KLRC seeks a tacit amendment of the IDO, but it fails to explain how such an amendment would be proper while the alleged amendments contained in the April 1, 2013 Commissioner Instructions were not.

³ Rocky Ford does not agree that the 325 acre-feet was properly stored, but the IDO gives the storage of 325 acre-feet based on flows historically stored from Merchant Creek first priority such that Rocky Ford does not at this time seek an order requiring release of that water.

the very least, the IDO requires that the direct flow diverters below Patterson Dam other than Rocky Ford (the “**Other Lower Users**”) receive their full decreed right before KLRC can store any water in Three Creeks under the Direct Flow Changes. But there has not been a single day of this irrigation season where that condition has been satisfied. As illustrated in the chart attached as **Exhibit C**, the total flow diverted by the Other Lower Users has never exceeded 34.62 cfs, but their water rights allow for diversion of more than 38 cfs and the capacity of their ditches is at least 36 cfs. Furthermore, on most of the days on which KLRC was storing, the total deliveries to the Other Lower Users was less than 30 cfs. The Other Lower Users, whose livelihoods depend on receipt of the water to which they are entitled, most certainly did not acquiesce in these shortages. Thus, even under KLRC’s desired interpretation of the IDO, there could be no storage under the Direct Flow Changes, and the improperly stored water should be immediately released to the lower Beaver users.

II. The Division Should Begin the Process of Issuing a Revised Storage Distribution Order for the 2015 Irrigation Season

An area of apparent agreement between Rocky Ford and KLRC is that the IDO needs to be revised. There is also apparent agreement that the contents of any new distribution instructions should be consistent with the decree resulting from the present litigation between Rocky Ford and KLRC. Indeed, Utah Code section 73-5-3 provides that “[t]he state engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under [Title 73].” Thus, the Division is obligated to conform any distribution order or instructions to court judgments related to water rights, including the decree that will issue in the present case between Rocky Ford and KLRC.

In order to have a revised distribution order in place before April 1, 2015, the Division needs to take appropriate action now. Rocky Ford is not overly concerned about the process the Division undertakes to issue the new order or instructions as long as Rocky Ford has a voice in that process and the process starts immediately. The Division has acknowledged that the change in distribution below Patterson Dam has resulted in questions on how storage should be distributed under the IDO. At the very least, the IDO should be revised to expressly describe how this change affects storage. Furthermore, under the currently-effective scheduling order, the case between Rocky Ford and KLRC is scheduled to be ready for trial by December 15, 2014. Accordingly, a decision should be issued at the beginning of next year and could be incorporated into the final distribution order. By promptly issuing a notice that a new distribution order will be issued before April 1, 2015, and requesting comments on that plan, any interested party can provide comments and have their concerns and interests heard, which should resolve the concerns expressed in KLRC’s April 5, 2013 Letter. Additionally, such a notice will inform the court that the Division recognizes questions in the IDO and intends to follow the decree when issued.

CONCLUSION

Rocky Ford desperately needs your immediate help. Rocky Ford appreciates the work that has been done so far by the Division, but more remains to be done, and it is up to your office

to do it. Any delay on the Division's part will make the looming damage to Rocky Ford irreversible.

Thank you again for the progress that has been made on the Beaver River. If you need any further information or have any questions regarding these issues, please do not hesitate to contact us.

Respectfully yours,

PARR BROWN GEE & LOVELESS

By



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